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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

THE HONORABLE EDWARD THAXTER GIGNOUX,
UNITED STATES DISTRICT JUDGE,

and

THE HONORABLE WILLIAM FRENCH SMITH,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Constitution require that resignation or impeachment and removal by the Congress precede the exercise of discretion by the Executive to prosecute a federal judge on charges that the acts by which he has exercised the judicial power constituted 'high Crimes'?

2. Can the existence of discretion in the Executive to prosecute, and thereby compel the Judiciary to try, a *sitting* federal judge on charges that his acts in exercising the judicial power violated the criminal laws be reconciled with the Constitution's grant of good behavior tenure to members of the Judiciary and its assignment of the sole powers of impeachment and removal to the Congress or with the doctrines developed to keep separate the powers of government and to guarantee the independence and impartiality of every federal judge?

3. Did the courts below err in exercising criminal jurisdiction to determine whether a *sitting* federal judge's official acts constituted serious crimes where the effect of that exercise was not only to pre-empt the constitutionally prescribed impeachment forum and to by-pass the procedures Congress has established for screening such charges in the judicial councils, but also to cast the presiding judges in the role of unnecessarily deciding issues that will substantially affect their own interests as judicial office holders?[1]

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[1] The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here and by the disposition of questions still pending before the district court.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that court entered against him.

OPINIONS BELOW

On February 17, 1982, the district court delivered an oral opinion and entered an order denying petitioner's motion to quash the indictment and dismiss the proceedings (App. B, *infra*, 12a - 15a). That court subsequently issued a memorandum opinion further explaining its decision. (App. B, *infra*, 16a - 19a). Those decisions have not been reported. The court of appeals affirmed the district court's decision and dismissed petitioner's application for writs of mandamus and prohibition (App. A, *infra*, 1a - 11a). That decision is reported, *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit entered on July 12, 1982 (App. C, *infra*, 20a). On September 22, 1982, that court entered an order denying petitioner's petition for rehearing and rehearing *en banc* (App. C, *infra*, 22a). The present petition was filed with this Court within sixty days of that date.

The Court of Appeals had jurisdiction under 28 U.S.C. § § 1291 and 1651 (1976) and under the collateral order doctrine expressed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Abney v. United States*, 431 U.S. 651 (1977); and *Helstoski v. Meanor*, 442 U.S. 500 (1979). *See also Nixon v. Fitzgerald*, _____ U.S. _____, _____, 102 S.Ct. 2690, 2697-98 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are based upon the provisions of the United States Constitution governing the tenure and removal of federal judges. U.S. Const., art. III, §1; art. I, §2, cl. 5, and §3, cl. 6 and cl. 7; and art. II, §4. In order to resolve the questions presented, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government. U.S. Const., art. I, §1; art. II, §1, cl. 1, §2, cl. 1 and cl. 2, and §3; and art. III, §1 and §2, cl. 1 and cl. 3. A determination of the proper interpretation of these constitutional provisions will require consideration of the purpose and function of the Judicial Council Reform and Judicial Conduct and Disability Act of 1980, Pub. L. 96-458, 94 Stat. 2035 (1980), *as codified at* 28 U.S.C. §372(c) (Supp. IV 1981), and of the provisions governing the disqualification of federal judges, 28 U.S.C. §455(a) and (b)(4) (1976 & Supp. IV 1981). Because of their length, the provisions involved have been included in an appendix to this petition (App. E, *infra*, 31a - 40a).

STATEMENT OF THE CASE

The United States indicted a federal judge in active service. The indictment charged that the acts by which the judge formulated a judicial decision constituted crimes under the laws of the United States. The accused judge moved to quash the indictment and dismiss the proceedings. He claimed that, unless and until the Legislative Branch exercised its constitutional prerogative to impeach and remove him, the Constitution and the separation of powers

doctrines barred the Executive Branch from prosecuting him for the manner in which he exercised the judicial power. He also claimed that the same principles coupled with those codified in 28 U.S.C. §455 barred the district court from assuming criminal jurisdiction to determine whether his judicial conduct constituted crimes under the laws of the United States. The district court denied the motion. The court of appeals affirmed. This petition asks this Court to review the court of appeals's judgment and resolve the fundamental constitutional questions presented.

Facts

The Honorable Alcee L. Hastings is one of five hundred United States District Judges. He was appointed in 1979 and actively served as a judge of the United States District Court for the Southern District of Florida until the Executive Branch initiated these proceedings.[2]

On October 6, 1981, Judge Hastings issued a final order in *United States v. Romano*, No. 78-364-Cr-ALH (S.D. Fla. Oct. 6, 1981) [hereinafter "the Romano Order"]. In May, Judge Hastings had entered a judgment of forfeiture against the defendant Romano brothers, upholding the government's claim that certain fruits and profits derived from racketeering activity were included in property forfeit under a federal statute commonly known as the RICO Act. The Romanos filed timely motions for reconsideration. While those motions were pending, the court of appeals for the circuit adopted an interpretation of the RICO Act that Judge Hastings had rejected in his original judgment. In the

[2]Judge Hastings voluntarily requested reassignment of pending matters when the government publicly announced the allegations against him.

Romano Order, Judge Hastings concluded he was bound to follow the law of the circuit. He modified his original judgment, restoring a portion of the property initially declared forfeit. *United States v. Romano*, 523 F. Supp. 1209 (S.D. Fla. 1981).[3]

On October 9th, a Justice Department attorney sent federal agents to Judge Hastings's chambers. The attorney instructed them to interview the judge's law clerks and staff concerning the issuance of the Romano Order and to serve a grand jury subpoena. The subpoena was addressed to the "Secretary, Chambers of the Honorable Alcee L. Hastings, United States Courthouse," and called for "the *official* records of the Honorable Alcee L. Hastings, Judge, United States District Court for the Southern District of Florida" [emphasis in original] including the judge's "Appointment diaries, daily schedules, . . . telephone message books, logs, and memoranda." Neither the judge nor his secretary was present. The agents interviewed the judge's clerks and staff in the judge's chambers and obtained the documents they sought from the judge's private office.[4] (R. 278, 356-60.)

On December 29, 1981, attorneys for the United States filed the indictment that initiated these proceedings. According to the indictment, the Justice Department had employed an undercover agent to pose as one of the Romanos. The undercover agent negotiated only with

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[3] *Appeal docketed*, No. 81-6139 (11th Cir., Nov. 14, 1981); *application for writ of mandamus filed, sub nom. In re United States of America*, No. 82-5114 (11th Cir., Jan. 18, 1982) (challenging trial court jurisdiction) (cases consolidated for hearing only, Feb. 1, 1982).

[4] This summary is based upon the description of the events set forth by the *government* in its opposition to the judge's motion to suppress the evidence seized from his chambers and inner office. The law clerks were subsequently called before the grand jury (*see* R. 214).

William Borders, a Washington attorney.[5] The indictment alleged that Borders and the agent agreed that the agent would pay Borders $150,000 in exchange for Judge Hastings issuing an order returning a substantial portion of the forfeited property and a promise that Judge Hastings would grant a subsequent re-sentencing motion. (App. D, *infra*, 23a -28a.)

The indictment charged that Judge Hastings had committed two crimes. Count I charged that Judge Hastings had conspired and agreed to permit Borders to solicit and receive a bribe from the Romanos in exchange for his "being influenced in his performance of official acts as a United States District Judge" and identified his issuance of the Romano Order as an overt act in furtherance of that conspiracy. Count II charged that Judge Hastings had disclosed to Borders the substance of, and the time when he would issue, the Romano Order and thereafter had issued the Romano Order "wherein the content and timing were consistent" with the prior disclosure, intending thereby to obstruct justice. (*Id.*)

To remove any doubt about the scope of the challenged conduct, the prosecuting attorneys represented to the trial court:

> [Counsel for the Government]: . . . .
>
> [W]e do recognize there's a possibility of some confusion or some inability to defend without a specific statement and representation by the Government that the conspiracy conceives only of the Romano case. When there's a representation made in these paragraphs [5 through 8] that there were criminal defendants, we speak of the Romano brothers, and when we speak of acts of Judge Hastings, we speak of official acts in the Romano case. . . . [F]or purposes of the indictment, we do make those specific representations.

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[5]Mr. Borders was also indicted. He was tried separately and convicted (*see* App. A, *infra*, 3a n.3).

THE COURT: And that is made of record at this time.

[Counsel]: Yes.

THE COURT: Would the Reporter mark his notes so that this may be recaptured.

(R. vol. 5, 191-92.)

Proceedings Below

The accused judge filed a timely motion to dismiss (R. 52-54, 231-62). Although the trial judge acknowledged that the motion presented substantial constitutional questions that could only be finally resolved by this Court, he denied the motion (App. B, *infra*, 12a -15a). The accused judge appealed to the United States Court of Appeals for the Eleventh Circuit and subsequently filed an application seeking writs of mandamus and prohibition directed to the trial judge and the Attorney General. That court affirmed the decision below and dismissed the application for writs (App. A, *infra*, 1a - 11a).

REASONS FOR GRANTING REVIEW

1. The constitutional questions are fundamental. The Honorable Alcee L. Hastings is a federal judge. Pursuant to Articles I, II, and III of the Constitution, he is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. I, §2, cl. 5, and §3, cl.6; art. II, §4; and art. III, §§1 and 2. The framers designed these provisions to protect members of the Judiciary from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only

remedy for judicial misconduct "consistent with the necessary independence of a judicial character." *The Federalist*, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

The framers' understanding was shared by all three branches of government, here and in England. The Crown has *never* prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 282 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive *never attempted* to prosecute an Article III judge; charges of serious judicial misconduct were *invariably* referred to the House of Representatives. *See* J. Borkin, *The Corrupt Judge* (1962) (for a summary). Largely for that reason, this Court has never been required to act. Petitioner is the first Article III judge in our nation's history who has chosen to remain in office *and* properly challenge the power of the Executive to indict and the Judiciary to try him on allegations that he committed impeachable offenses in exercising the judicial power.

Against this background, the constitutional issues presented are fundamental in the most literal sense of the word. They represent issues that go to the heart of our structure of government. Their resolution requires definition of the powers of each of the three branches of government, definition that must expand or contract the powers of at least one and perhaps two of those branches. This is one of those rare cases that presents issues of first impression whose resolution will have a far-reaching and long-lasting affect on how the three branches of government behave. But the need for resolution of these questions by this Court has been enhanced because Congress and the Executive have recently taken actions which make conflict inevitable unless this Court acts.

Congress construed its powers when it enacted the Judicial Council Reform and Judicial Conduct and Disability Act of

1980, Pub. L. No. 96-458, 94 Stat. 2035, 28 U.S.C. §372 (Supp. IV 1981). By that Act, Congress delegated substantial administrative and disciplinary powers to the Judiciary. But Congress also reasserted that impeachment and removal were its sole prerogatives. Congress expressly mandated that a circuit judicial council and even the Judicial Conference of the United States shall "in no circumstances. . .order removal from office of any judge appointed to hold office during a good behavior. . . .," *codified at* 28 U.S.C. §372(c) (Supp. IV 1981). Congress declared that the power delegated to the Judiciary did not include the power "to prejudge an impeachable offense, a determination that under the Constitution can only be made by the Legislative Branch."[6]

The Executive has asserted here that, prior to his resignation or removal from judicial office, it has the power to indict a federal judge on allegations that the judge committed high crimes in the exercise of the judicial function. The Executive has acted to ensure those powers will be fully exercised against all judges. If the Executive is correct, then the Judiciary has the power to exercise criminal jurisdiction to determine whether a federal judge has committed an impeachable offense. These powers conflict with the construction Congress has given its own powers. Resolution of that conflict is necessary, not only to determine the conditions necessary for an independent judiciary, but also to avoid a conflict within the Judiciary—a conflict between the judicial council's administrative jurisdiction and the district court's criminal jurisdiction.

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[6]S. Rep. No. 362, 96th Cong., 2d Sess. 6 (1980, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4315. *See also* H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980). The House bill was substituted for the Senate version in conference. *See* discussion, *infra,* 16-17.

2. The Executive's actions threaten irreparable harm to the Judiciary. The Executive has now asserted that the Attorney General, the United States Attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[7] The Justice Department has acknowledged that, in the first five years of its existence (1976-1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[8]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States Attorneys or other federal agencies. The Executive has not reported whether any of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised

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[7]Brief for Appellee United States of America, at 42-43, *United States v. Hastings, supra.*

[8]*Judicial Tenure and Discipline—1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 1st and 2d Sess. (Comm. Print. 1980) [hereinafter "Hearings"], 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'.

There are five hundred United States District Judges in active service. They occupy the front-lines of the federal judicial system. Almost fifty percent of the cases coming before them involve disputes to which the Executive is a party.[9] Daily, these judges must deal with Justice Department attorneys and Assistant United States Attorneys employed to assert the Executive's interests and, on the criminal side, to exercise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people — the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

3. This case and the context in which it arose present the basic constitutional questions in their narrowest form and illustrate the fundamental concerns that require this Court's review. First, the case itself: As the Executive concedes, it has asserted its claimed powers to their outer limits. Acting on an informant's tip, the Justice Department employed an undercover agent to pose as a defendant. The agent dealt solely with an alleged attorney co-conspirator, never with the accused judge. The indictment charged the judge with the inchoate offense of conspiracy and with obstruction of justice based upon an alleged premature disclosure of a

[9] *See Annual Report of the Director of the Administrative Office of the United States Courts (1981),* 125-128, 197-207, 251-269.

judicial order. The Executive's attorneys represented to the trial court that the indictment was based solely on the judge's official acts in the *Romano* case. The investigation, the indictment, and the Executive's representations make it clear that neither charge can be proven unless the Romano Order itself and evidence showing the manner in which it was formulated and discussed are admitted at trial and submitted to the jury.

The Executive has asserted that its prosecutorial powers necessarily require that it be able to reach into the heart of a judge's chambers, using electronic surveillance and the powers of the Grand Jury to probe the minds of a judge's official staff and examine a judge's private records and communications to determine whether that judge committed a crime in the exercise of the judicial power. In effect, the Executive here denies that the Constitution even *stays* its discretion to prosecute a federal judge pending impeachment in circumstances in which it must concede the Constitution would absolutely *prohibit* the exercise of that discretion against a legislator. *See United States v. Brewster,* 408 U.S. 501 (1972) (Speech or Debate Clause immunizes members of Congress from charges requiring evidence of their official acts in exercising the legislative power).

Second, the context: The fact that it was Judge Hastings who was charged and that it was his decision in *Romano* that formed the basis for those charges illustrates not only the breadth of the discretionary powers the Executive claims, but also the potential for their abuse. Judge Hastings is a controversial judge. He was the first black appointed to the bench in the Southern District of Florida. He was appointed by a Democratic President. In his first three years in office, he demonstrated an independence and a perception of the

law that ran counter to positions the Executive had vigorously asserted.[10]

In the courts below Judge Hastings chose to defend his office on constitutional principle. For that reason, his motion did not seek and could not have sought an evidentiary hearing to determine whether the Executive had in fact abused its discretion. But the facts reported are matters of public record and illustrate the potential for abuse inherent in the unfettered discretion the Executive claims and has exercised in this case. The Executive did in fact choose to exercise its discretion against a controversial judge. It chose as the vehicle for that exercise a case to which it was a party and in which it had suffered an unfavorable decision. By that exercise, the Executive was in fact able to precipitate the immediate reassignment of what it perceived as a major immigration case from a judge who had already made clear his disposition to rule against it. *See Louis v. Meissner,* 530 F. Supp. 924 (S.D. Fla. 1981) (preliminary injunction restricting Executive's right to conduct exclusion proceedings for Haitian nationals on whose behalf suit was brought).

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[10]*See* Press, *The Judge and His Friend,* Newsweek, Oct. 26, 1981, at 75, and Pike, *Was This Judge's Courtroom for Sale?,* Nat'l L. J., Oct. 26, 1981, at 1, col. 2 and 3. For example, the judge first ruled against the Executive's immigration policy for the Haitians in *National Council of Churches of Christ v. Egan,* No. 79-2959-Civ-ALH (S.D. Fla. Jan. 10, 1980) (modifying and extending a preliminary injunction and denying the government's motions for summary judgment and dissolution of an existing injunction). The Justice Department chose to initiate its investigation against Judge Hastings after he had been assigned a second case in which Haitian refugees sought to block the Executive's attempt to solve the Haitian problem through summary exclusion proceedings. *Louis v. Meissner,* No. 81-1260-Civ-ALH (S.D. Fla. *filed* June 10, 1981). The Associate Attorney General responsible for the division through which that investigation was conducted was also the Associate Attorney General responsible for directing the administration's immigration policy. *See The United States Government Manual 1982/83,* 319, 321, 810.

4. This case may provide the only meaningful opportunity this Court will have to address these questions. The establishment of a Public Integrity Section in the Department of Justice and its actions to date suggest that judicial prosecutions will occur more frequently in the future if this Court permits the court of appeals's decision to stand. However, the four judicial prosecutions that have occurred and an analysis of the problems the threat of criminal prosecution poses for a federal judge suggest that years may pass before another judge pursues the constitutional challenge to this Court.

The Executive has prosecuted only two persons who were judges at the time of their indictment[11] and only two others who had been federal judges.[12] None of the four chose to

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[11]Circuit Judge J. Warren Davis had retired in 1939 in the face of mounting evidence of judicial misconduct. He retained the benefits to which a retired judge was then entitled. The Executive indicted and twice prosecuted him in 1941. Both cases were tried by a jury; neither produced a verdict. The indictment was dismissed. Davis then resigned completely to avoid impeachment. J. Borkin, *The Corrupt Judge*, 95-137 (1962).

Otto Kerner was the first and is the only federal judge to be indicted, tried, and convicted while he was a judge in active service. But the charges against Judge Kerner stemmed from his pre-judicial conduct as Governor of Illinois. In addition, Judge Kerner did not challenge the indictment or prosecution before trial; he elected to take his chances with a jury and lost. Only after his conviction did he urge that his conviction was invalid because the Constitution required impeachment before trial. Two circuit judges on the special panel assigned to hear Kerner's appeal concluded he had not waived this claim and went on to opine that the Constitution did not require impeachment before trial. The third concurred in the judgment, but only on the ground that Kerner had waived the claim by failure to assert it before trial. This Court declined to review that decision. *United States v. Isaacs*, 493 F.2d 1124 (Special Panel), *cert. denied*, 417 U.S. 976 (1974).

[12]Two other judges have been indicted after they had resigned from office to avoid impeachment: Circuit Judge Marvin Manton and District

(continued)

remain in office *and* challenge the Executive's authority. All sought the protections accorded them as individual defendants in a criminal trial rather than risk the impeachment process. The judge accused here is the first judge to hold his office and properly assert the constitutional challenge to the Executive's authority in order that this Court might have the opportunity to consider and resolve these questions.

Any judge threatened must be concerned with the costs of a constitutional challenge and with the costs and risks of impeachment proceedings. The precedent established by the court of appeals's decision here [and its interpretation of *United States v. Isaacs*, 493 F.2d 1124 (Special Panel), *cert. denied*, 417 U.S. 976 (1974) and this Court's recent *dicta* as precedent] would diminish the prospect for a successful constitutional challenge. The fact of that precedent, coupled with the other costs and risks, might well lead any future judge to consider bargaining a resignation or retirement in exchange for a favorable exercise of Executive discretion. The weak, the vulnerable, or the corrupt judge might be influenced to exercise judicial discretion in favor of the Executive, hoping to induce a favorable exercise of prosecutorial discretion by the Executive in return. Every judge must recognize that his or her rights as an individual can be protected better in the judicial system, with the

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(footnote continued from preceding page)

Judge Albert Johnson. Borkin, 28-32, 138-181 (1962). Judge Johnson was acquitted; Manton was convicted. *(Id.)* Manton argued that he was absolutely immune from prosecution for his official acts as a judge. The court of appeals rejected that contention and this Court declined review. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). That question, of course, is not presented here. Judge Hastings has never claimed immunity; he claims only that the Constitution defines the correct sequence of remedies for judicial misconduct.

special procedural rights accorded a criminal defendant and the requirement that the Executive persuade a jury that guilt has been established beyond all reasonable doubt, than they can in impeachment proceedings. None of these 'judicial' decisions will be reviewable.

If the Executive has, in fact, the discretion it has here exercised against Judge Hastings, it has and may exercise that same discretion with respect to any federal judge. The Executive's actions since 1976 make it clear that the threat that substantial and increasing numbers of cases to which the United States is a party are being presided over by investigated but unindicted federal judges is real. This Court should not permit that to continue without first deciding whether the Constitution permits it. This may be the only opportunity this Court will have to address the questions presented before the damage to the Judiciary and its credibility are beyond repair.

5. The powers the Executive has exercised here also conflict with the construction Congress gave its own powers in 1980 and have placed the Judiciary in a dilemma. Congress has authorized the Judiciary to address problems of judicial behavior through the administrative powers vested in the circuit judicial councils but has prohibited the Judiciary from conducting public adversary proceedings to predetermine whether an impeachable offense has occurred.[13] The Executive has acted here to compel the district

[13]In adopting the 1980 Act, Congress construed its own impeachment prerogative as exclusive. It concluded that both constitutional principle and contemporary policy precluded delegation of the power to remove or to prejudge an impeachable offense to the Judiciary. Congress concluded that the powers it had delegated to the judicial councils "—combined with increased vigilance on the part of Congress for possible impeachment of a Federal Judicial officer — affords the public adequate protection from the occasional corrupt judge without creating open season on judicial

(continued)

court to exercise the judicial power in a public and adversarial proceeding to adjudicate whether an impeachable offense has occurred. The two positions conflict. The Court should act, not only to resolve the conflict between the Executive and the Legislative Branches, but also to determine what roles the Judiciary may properly perform and how those roles should be performed. None of the three branches of government can function correctly until this Court has made those determinations.

When it acted, Congress was fully aware of the Executive's claim that criminal prosecution provided a more effective and efficient method of dealing with charges of judicial corruption. Before the Congress and in the courts below the Executive frankly conceded that the powers it has asserted are inconsistent with a construction that Congress's impeachment powers provide the primary remedy for judicial corruption. It not only urged that criminal prosecution and judicial trial are constitutionally permissible mechanisms for addressing charges of judicial corruption, it also argued that they should be recognized as the preferred means for addressing these problems.[14]

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officers." In so doing, Congress expressly rejected proposals to create a court of judicial conduct in which "sincere or malevolent party litigants and their enthusiastic attorneys" might prosecute "complaints against federal judges . . .[in] a formal adversary accusatorial proceeding" because such a proposal "raised the dangers of a substantial chilling effect on judicial independence. . . ." H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980). Accordingly, Congress mandated ". . .that . . . in no circumstances may the [circuit judicial] council [or the Judicial Conference] order removal from office of any judge appointed to hold office during good behavior. . . ," 28 U.S.C. §372(c)(6)(B)(vii) and (8)(Supp. IV 1981), and that all matters before the councils be treated confidentially, 28 U.S.C. §372(c)(14)(Supp. IV 1981).

[14]*See* Brief for Appellee United States of America, *supra* note 7, 42-47; *see also Hearings, supra* note 8, 159-68 (Statement of Maurice Rosenberg, Ass't. Atty. Gen.), 141 (Remarks of Rep. McClory), and 143 (Remarks of Rep. Kastenmeier).

The Executive also frankly acknowledged the consequences that flow from its position. The Executive urged that the investigative resources and expertise of the Justice Department combined with the daily participation of its attorneys in the federal courts make it the agency best able to ferret out judicial corruption.[15] Under this view, the decision whether to initiate criminal proceedings or to refer charges to the appropriate circuit judicial council or to the House of Representatives is, in the first instance, a matter primarily committed to Executive discretion, and by assigning a role in the screening process to the judicial councils, Congress merely created an additional option for the Executive.

The Executive also freely conceded that the powers it claims here will return the impeachment powers of Congress to the residual status those powers had in England prior to the Act of Settlement, 1700, 12 & 13 Will.3, ch. 2. & 3. They will again become residual powers, primarily useful for terminating the benefits of a convicted judge and occasionally useful for removing a corrupt judge when the Executive is unwilling to act or for removing an acquitted judge if an Executive prosecution fails.

If the Executive is correct, Congress need not exercise "increased vigilance . . . for possible impeachment of a Federal Judicial officer", and the circuit judicial councils should take care to assure that they do not act in administrative proceedings to undermine the rights of an accused judge to be tried judicially like any other individual. If the Executive is wrong, it should be told that the products of its vigilance must be reported to the House of Representatives (or to a judicial council) so that the discretion may be initially exercised by the neutral branch.

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[15] *Ibid.*

The Congress has assigned and the Judiciary has exercised substantial administrative powers to increase judicial efficiency and accountability. *See Chandler v. Judicial Council of the Tenth Circuit of the United States,* 398 U.S. 74, 96-102 and 109-10 (1970) (Harlan, J., concurring) and *DuPlantier v. United States,* 606 F.2d 654 (5th Cir. 1979) (for descriptions of these powers prior to adoption of the 1980 Act). The price for these improvements has been a substantial diminution in the independence of the individual judge. *See, e.g.,* Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681 (1979). The 1980 Act added to these powers, but attempted to do so in a way that preserved the delicate "balance between the need for judicial independence and the need for judicial accountability."

This Court should now decide whether the powers the Executive claims here are consistent with the delicate balance judicial independence requires. The five hundred district judges, who must daily resolve conflicts between the Executive and the people and who are the primary object of the existing regulatory mechanisms; the circuit judicial councils and conferences, which must strive to exercise the administrative powers while preserving judicial collegiality; and the people, whose right to an independent and impartial judge is in question — all require resolution of the questions presented which only this Court can provide.

6. The decision below conflicts with principles this Court has consistently held necessary to maintain an independent Judiciary. The Executive and the court of appeals relied upon *Isaacs, supra,* and four scattered *dicta* in this Court's opinions for authority.[16] But neither *Isaacs* nor the *dicta*

[16]Prior to 1970, this Court's *dicta* seemingly prohibited criminal prosecution of a federal judge. *See Randall v. Brigham,* 74 U.S. (7 Wall.) 523, 537 (1869) (impeachment only remedy for faithless, corrupt, or dishonest judge); *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 354 (1871) *(continued)*

address the questions presented here, and the court of appeals's decision here conflicts with fundamental principles which this Court has regularly held necessary to judicial independence.

In the month preceding that decision, this Court twice reiterated the history, the function, and the importance of the doctrine of judicial independence. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (June 28, 1982), and *Nixon v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2690 (June 24, 1982). That doctrine was developed to assure the people that federal judges could and would exercise the judicial power impartially and without fear of the consequences to themselves of that exercise.

> This was a doctrine " 'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' "

Nixon v. Fitzgerald, 102 S.Ct. 2690, 2700 [*quoting Pierson v. Ray*, 386 U.S. 47, 554 (1967), *quoting Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)]. Its importance is clear:

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

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(remedy for 'malice or corruption in their action whilst exercising their judicial function' is prosecution in the form of impeachment or as may be specially prescribed). But recently the Court has assumed that all judges could be criminally prosecuted [*see* authorities collected and relied upon by the court of appeals here (App. A, *infra*, 10a n.17 and 11a n.18)] without ever analyzing the structural consequences of applying that assumption to permit pre-removal prosecution of Article III judges [*see, e.g., Nixon v. Fitzgerald*, 102 S.Ct. 2690, 2710 (White J., dissenting)].

Northern Pipeline, 102 S.Ct. 2858, 2866 (plurality opinion).

The court of appeals declined to address the history or the function, and failed to analyze accurately the importance, of judicial independence. That court based its decision upon its conclusion that:

> [T]he miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high he is above the law.

(App. A, *infra*, at 10a.)

The basic premises underlying that conclusion are flawed. First, the assertion that the increment is "miniscule" cannot be reconciled with the Executive's own assertions, let alone the nature of our contemporary judicial system. Second, the conclusory characterization of the increment as miniscule cannot be reconciled with this Court's analysis or conclusion in *Northern*.[17]

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[17]In *Northern*, the Court was required to measure the 'increment in judicial independence' between Article III judges constitutionally guaranteed "life tenure, subject only to removal by impeachment . . . and a fixed and irreducible compensation" and the new bankruptcy judges appointed to fourteen year terms, subject to discipline or removal by the judicial councils, and guaranteed the salary protection afforded all federal civil officers, 102 S.Ct. 2858, 2862. A majority of the Justices were persuaded that the possibilities for interference by the Executive, Congress, and by judicial colleagues posed sufficient danger that Congress could not delegate mandatory jurisdiction over common law contract claims to such judges. *Id.* at 2880 (Rehnquist, J., concurring). The court of appeals's conclusory assertion that federal judges would gain only a "miniscule increment of judicial independence" from a constitutional rule denying the Executive a discretionary power to threaten individual judges cannot be reconciled with the conclusion reached by a majority of the Court or with the 'balancing' of legislative and judicial functions analysis employed by the dissenting justices in *Northern*, *Id.* at 2893-94 (White, J., dissenting).

Third, the assertion that the rule sought here would place judges 'above the law' is simply wrong. The accused judge here has never claimed that he is above the law, and the principles he advocates would not place him there. He claims no immunity; he claims only that, unless he chooses to resign, the Constitution defines the correct sequence by which his judicial conduct may be challenged and judged: impeachment and removal first, and then, *and only then,* prosecution and trial. He claims that both the Constitution and the doctrine of separation of powers confer upon him a right to insist that that sequence be followed.

In *Nixon,* this Court addressed the claim that immunity from civil liability for conduct in office would make the President a 'man so high he was above the law.' In rejecting the claim, the Court ruled:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment.[39]
>
> . . . .
>
> The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

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[39]The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. *See* Kaufman, *Chilling Judicial Independence,* 88 Yale L.J. 681, 690-706 (1979). Congressmen may be removed from office by a vote of their colleagues. U.S. Const. art. I, §5, cl. 2

102 S.Ct. at 2705-06 (other footnotes omitted).

The rule of absolute immunity from civil liability for the President or for federal judges may advance compelling public ends, but it does so at the expense of substantial private rights. In that context, the constitutional remedy of impeachment is a limited alternative: it protects "the public interest in the rule of law," but does nothing to remedy the private wrong.

A requirement that the constitutional remedy of impeachment precede the Executive's exercise of prosecutorial discretion against a federal judge advances a compelling public end: the interest of the people in having an independent Judiciary. It does so at the expense of neither public nor private rights. As a remedy for 'high Crimes and Misdemeanors' in office, the constitutional remedy is a true remedy. In that context it vindicates the same rights as the criminal laws. For a judge, it is a supplemental, not an alternative, remedy. Far from placing judges above the law, it subjects them to the law and defines the correct sequence of remedies for official misconduct. After a judge's removal from office, the Executive may prosecute and the Judiciary may judge him like any other man.

We aspire to have a 'government of laws, not of men;' but those laws must be administered by men, and we have always known that 'men entrusted with power tend to abuse it.' The judicial office exists to assure that we remain a government of laws. The guarantees of life tenure and irreducible compensation were given to insulate the judicial officer from the temptations of political ambition and the fear of personal consequence. Both the temptations and the fear encourage abuse of official power. Those guarantees were granted, not to protect the judge, but to assure the people that we would retain 'a government of laws, not of men.'

The court of appeals did not analyze these issues or this Court's decisions. As a result, the precedent created by its

decision threatens tremendous harm to another of the most treasured values of our constitutional system. That court yielded that which was not its to give: the right of the people to an independent Judiciary. This Court should not permit such a decision to stand as a precedent for the future unless it is fully satisfied that the delicate balance can be preserved.

7. The courts below refused to address a third and separate doctrine that this Court has consistently held necessary to an independent Judiciary. Impartiality and independence are the two conditions necessary to the constitutional exercise of the judicial power. That no judge shall preside in any case where he or she has interests that may be affected by the outcome has long been recognized as the minimum condition of impartiality.

Decisions required in this case will define privileges and immunities incident to the federal judicial office. If the proceedings in the court below continue, the trial judge will have to decide whether a federal judge's chambers, official papers, and conversations with his or her law clerks or others are entitled to any special protection or privileges by virtue of the judicial office. That judge will have to determine whether a jury of lay persons should be permitted to consider a district judge's opinion, the appellate opinions upon which it relied, and testimony about how the judge prepared it. Such evidence would be necessary to enable the jury to determine whether the accused judge's decision constituted an overt act in furtherance of a criminal conspiracy and whether any conversations the accused judge may have had concerning the decision evidenced an intent to obstruct justice. The judge who decides these questions will be resolving questions that substantially affect his own interests and the interests of every other federal judge.

This Court has already ruled that, in controversies between an Article III judge and another branch of government requiring construction of section 1 of Article III, the Judiciary is *as a matter of law* deprived of the required impartiality.

United States v. Will, 449 U.S. 200 (1980). There the doctrine of necessity compelled a reluctant Court to act because there was no other forum where the controversy could be adjudicated. Here, however, the necessity to proceed beyond the jurisdictional questions presented is not apparent. The Constitution established a forum in which a federal judge can be tried for the crimes alleged here.

Petitioner presented and fully developed this issue in both the lower courts. The trial court declined to discuss them, and the court of appeals chose to characterize them as "totally devoid of merit" (App. A, *infra*, at 11a n.20). The refusal of those courts to address this issue is inconsistent with the sensitivity this Court mandated in *Will*. The result the court of appeals reached conflicts both with *Will* and the mandate codified at 28 U.S.C. §455(a) and (b)(4) (1976 & Supp. IV 1981). The lack of sensitivity as well as the apparent conflict provide a substantial and independent ground for this Court's review.

8. The criminal prosecution of a federal judge must (as it has here) result in such substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings as to call for guidance from this Court in the exercise of its supervisory powers. The necessary and the probable disruptions are apparent. The Executive's decision to prosecute an active judge must necessarily cause considerable disruption in the management of the judicial business. The disruptions to the judicial business of the Southern District of Florida and the District of Maine illustrate the problems that must occur.[18]

[18]Unless the Executive chooses to use the confidential procedures available through the judicial councils, public disclosure of such charges to the House would cause substantial disruption in the accused judge's district. But use of the criminal process will always require that the Chief Justice of the United States select a judge to preside in the case and will require that that judge lay aside a portion of the business of his or her own district.

Far more significant disruptions, however, will flow from an acquitted judge's return to the bench. The practical effect of a criminal prosecution followed by an acquittal is that the Executive may have effectively disqualified the acquitted judge from exercising the judicial power. In the bitter aftermath of this litigation, Judge Hastings may be called upon to resume the role of impartial judge in controversies to which his present adversary is a party. It will thereafter be in the power of the government's attorneys to argue that the judge must disqualify himself because "his impartiality might reasonably be questioned." *See* 28 U.S.C. §455 (a) (Supp. IV 1981). Indeed, any individual criminal defendant might question whether a once-acquitted Judge Hastings would have the impartiality or independence to again challenge the Executive by ruling against it on difficult or close questions. It would be hard to rule that such a defendant has no reasonable grounds for such a challenge. *See Reid v. Covert*, 354 U.S. 1, 22 (1957).

The United States is party to all criminal and numerous and substantial civil actions in the district courts. Every litigant coming before those courts is entitled to an impartial assignment of judges. Every district judge is entitled to expect a fair distribution of the judicial work of the district. To cripple one judge is not fair to the judge crippled nor to the remaining judges nor to the litigants who come before that court. The Constitution does not provide for partial Article III judges.

The problems this case presented and the manner in which the court of appeals addressed them illustrate the kinds of special problems judicial prosecutions are likely to present, problems that only guidance from this Court can resolve. For example, petitioner suggested from the outset that disqualification by all judges of the Eleventh Circuit was appropriate. He pointed to the action the judges of the Second

and Seventh Circuits had taken when the appeals of Judges Manton and Kerner had come before their courts. He urged that the increased importance of the circuit judicial conference and the expanded administrative powers of the circuit judicial council enhanced the need for circuit disqualification. The court rejected that request without comment and then proceeded to pre-empt its normal screening and assignment procedures.[19]

The Judiciary has demonstrated that it has the ability to adapt its normal procedures to address the problems presented by the abnormal case. But the necessity for judges to create and employ special procedures to address the problems presented by a case which requires that federal judges exercise the judicial power to resolve charges brought by the Executive against another federal judge are unique and require special sensitivity. At a minimum, the procedures by which such cases are handled should be uniform among the circuits and designed to minimize the disruptions during and in the aftermath of these cases. The problems this case has caused and will create illustrate clearly the kinds of disruptions the Judiciary will have to confront if the practice is to continue. Simply stated, these disruptions may threaten the Judiciary's ability to administer its own affairs and cause reasonable observers to question the impartiality with which such cases are decided. This Court should exercise its supervisory jurisdiction to provide the necessary guidance.

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[19]The departures from the court's rules and practices are apparent from the dockets the court maintained for these cases and are summarized in petitioner's Petition for Rehearing and Suggestion for *En Banc* Rehearing, *United States v. Hastings*, Nos. 82-5262 and 82-5715 (11th Cir. 1982) (consolidated).

CONCLUSION

By its judgment, the court of appeals discarded a constitutional tradition that is now 282 years old. No *sitting* judge holding good behavior tenure has ever been criminally prosecuted and convicted for the manner in which he exercised the judicial power. For that reason, neither this Court nor the English courts have had to decide the questions presented here. It may be the tradition deserves to be discarded. But surely claret of that vintage should be savored carefully before it is rejected in favor of the *nouveau beaujolais* offered as replacement here.

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that court entered against him.

Respectfully submitted,

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